Prepared Remarks of Attorney General Alberto R. Gonzales at the American Enterprise Institute

Washington, D.C.
January 17, 2007

Good morning, and thank you. I am pleased to be here with you today to talk about the federal Judiciary.

It has been said many times that the greatness of the American system of government, what has allowed it to thrive, is its simple foundation in the rule of law. And that continues to be true today because of the protection afforded to the rule of law by our great Judiciary.

While my reverence for judges and the Judiciary originated in law school and were molded during my service as a justice on the Texas Supreme Court, I have gained an even deeper and more robust appreciation for the Third Branch since being appointed Attorney General nearly two years ago.

The Framers of the Constitution truly were inspired in constructing the Judiciary the way they did: Appointment by the President "with the Advice and Consent of the Senate"; jurisdiction to hear only real "Cases" or "Controversies"; life tenure during "good Behaviour." My remarks today will focus on what I see as three essentials to allowing our Judiciary to continue to live up to the ideals of the Framers and preserve its place as the cornerstone of our constitutional democracy.

First, the Judiciary must be strong and independent. Second, for the rule of law in America to continue to be an example for the world, judges must understand and perform their proper role in our democratic society, as was intended by the Framers. And third, the very best people must fill these important judgeships—people who believe in the rule of law.

I. JUDICIAL INDEPENDENCE

A strong and independent Judiciary is necessary for our republic to remain strong, for our democracy to survive, and for the rule of law to flourish. To understand what I mean by independence, let me first clarify what independence is not.

Judicial independence does not mean complete freedom from scrutiny or criticism. Judges' decisions may be criticized, and the nature of the job virtually guarantees it. After all, in every court case there will be a loser. Judges must resist the temptation to craft their opinions to avoid criticism or to seek

approval, whether from the press, the public, the academy, or Congress.

The Framers granted federal judges lifetime tenure precisely so that they would be insulated from these sorts of pressures. Alexander Hamilton put it plainly in Federalist 78 when he wrote that lifetime tenure "during good behaviour" is the "best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws."

Judges also can help to maintain their independence, and shield themselves from public opinion, by deciding cases on neutral principles – not by considering factors, such as policy or the public mood, that are appropriately considered by the politically accountable branches.

Let me be clear about one thing. While criticism comes with the territory, I firmly believe that judges should not be subjected to retaliation for their judicial decisions, by budget cuts or through misguided efforts like the recent Jail for Judges initiative in South Dakota.

Some have also suggested creating an Inspector General for the Judiciary who would answer to Congress. I oppose this idea. The Judiciary should police itself, and if it does, the other two branches should not intervene. I believe the Judiciary is making commendable efforts to ensure its integrity. Justice Breyer's recent review is a good example.

And it should go without saying that threats to the safety of judges or their families are reprehensible.

I believe that judicial independence also would be strengthened if judges were paid more. I'm not going to argue that federal judges are not earning a livable wage. And I'm not going to argue that the government can or should match dollar-for-dollar the potential private sector salaries these dedicated men and women could make. But there should be some meaningful effort to increase salaries to allow the Judiciary to attract and retain the best legal minds – lawyers who could find far more lucrative ways to ply their trade.

As Chief Justice John Roberts noted in his year-end report on the federal Judiciary, "If judicial appointment ceases to be the capstone of a distinguished career and instead becomes a stepping stone to a lucrative position in private practice, the Framers' goal of a truly independent Judiciary will be placed in serious jeopardy."

Over the years, I have talked with too many potential judicial nominees who have politely declined consideration precisely because they did not feel they could afford to serve. I hope the Congress will consider enacting a meaningful pay raise for judges, so that future candidates for judicial office will not be faced with that choice, and so that judicial independence will be strengthened.

The Congress also should enact legislation to create more judgeships to handle the overwhelming workload now clogging our court system. Judicial workloads in most federal courts continue to increase, including crushing caseloads in the southwest border districts. There is a strong, and appropriate focus on detaining more undocumented aliens here illegally in this country, yet very little attention on the downstream impact upon the workload of our prosecutors and judges. Congress has not passed a comprehensive judgeships bill since 1990, despite tremendous increases in the number

of cases being filed. This is just a variation on inadequate pay for the tremendous work of federal judges. Again, judges cannot carry out their constitutional duties adequately when dockets are stretched to the breaking point.

II. THE PROPER ROLE OF A JUDGE

Now, it is not enough for the courts only to be strong and independent. Judges also must understand their role in our system of limited government.

I am concerned that some have lost sight of the role of the Judicial Branch as the Framers intended it to be.

I do not believe the Framers ever intended for the Judicial Branch – the Supreme Court or the lower courts – to make policy. It is worth recalling Hamilton's famous words, again from Federalist 78: "The Judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them."

In arguing that states should ratify the Constitution, Hamilton sought to allay the concerns of those who feared that courts would endanger the political accountability of lawmakers or Executive Branch officials. In effect, he said, "Don't worry, courts won't be capable of arrogating to themselves the power of law- or policy-making."

Of course, the power and authority of courts – whether to improperly take policymaking power for themselves or to engage in legitimate decision making – is dependent upon the weight of their judgment. That is, it depends on their credibility with the public and the other branches of government. Judicial decisions are obeyed, in large part, because the judgment of the federal Judiciary is respected.

But it is perhaps underappreciated that when courts apply an activist philosophy that stretches the law to suit policy preferences, they actually reduce the credibility and authority of the Judiciary. In so doing, they undermine the rule of law that strengthens our democracy.

In contrast, a judge who humbly understands the role of the courts in our tripartite system of government decides cases based on neutral principles. He generally defers to the judgment of the political branches, and respects precedent – the collective wisdom of those who have gone before. In so doing, that judge strengthens respect for the Judiciary, upholds the rule of law, and permits the people – through their elected representatives – to make choices about the issues of the day.

It is no accident that the person President Bush chose to head the Judiciary, Chief Justice Roberts, made this point in terms all Americans could understand: "Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire."

When judges uphold laws enacted by Congress and actions taken by Executive Branch officials, they are sending a very clear message to the American people: "You have chosen this path, and it is presumed to be the right one because you have chosen it."

If the American people disagree with a law Congress has enacted or a policy of the Executive Branch, they have the right to vote Congress or the President out of office. That is the method by which the Constitution keeps control in the hands of the people and keeps our limited government limited. It is my strong belief that activist judges who take that power into their own hands do not serve the Constitution or the people well. They fundamentally misunderstand the role of a judge.

I also am concerned about judges who imagine they see everything in society addressed in the Constitution. It is worth remembering that the Constitution is a very brief document. It defines the structure and authority of the federal government and protects a limited list of sacred rights. It does not, and was never intended to, address every legal issue that might arise in our nation's history.

Democracy is well-served when the Court says, in effect, "the Constitution simply does not comment on this issue." In contrast, constitutionalizing an issue takes it out of the democratic process. If the people disagree with a court decision based on the law, they have a remedy in the political process. Through their elected representatives, they can change the law.

But once a court declares a law to be unconstitutional or prohibits some agency action on constitutional grounds, it is limiting the options of the people. Such a step should be taken only where it is clear that the Constitution has truly spoken on the issue and forbidden what the political branches have determined to do.

Of course, if a law or an agency action is unconstitutional, then judges, consistent with their oaths of office, should not hesitate to strike it down or prohibit it. But courts should exercise extreme caution. Members of Congress and Executive Branch officials take an oath to uphold the Constitution just as judges do. Courts that rush to invoke the Constitution to strike down the actions of the other branches sell short the wisdom and the prerogatives of the legislature, the President, and the people.

A judge with life tenure who gives his own views on political and policy matters greater weight than the considered viewpoint of the elected representatives of the people, or who believes he alone knows what is the best policy, can make great mischief. The Framers understood this. Hamilton said, "It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature."

Activist judges – those who on a pretense substitute their own views for the will of the legislatures – can find some rationale to support any outcome they desire. They can find in legislative history some quote to support their viewpoint. They can find a footnote in an earlier decision, and extrapolate from that a new principle despite what the language of the law itself says.

But in the end, distorting history or precedent to support a pre-determined outcome weakens the Judiciary, undermines the rule of law, and harms our democracy.

Courts must protect people from the "tyranny of the majority." That is certainly true. But we must also guard against the tyranny that results when unelected activist judges—both on the right and on the left—undermine the right of the people to govern themselves.

As we recently have seen, under our system of government, no legislative majority can expect to last forever. And no President can serve more than two terms. As long as the people retain the power, I have faith that they will exercise it prudently. When power is held by a few, however, we face a far greater danger. There is a fundamental difference between the tyranny of the majority and the will of the people.

Congressional majorities do not get to run roughshod over the Constitution, but if at the ballot box the people have decided they favor your policy goals, then you get a chance to set policy. Right now the Democrats control Congress. Where they have the votes to enact laws supporting their policies, they should be free to do so without contradiction from activist judges who disagree with those laws on policy grounds.

Now, just as judges must understand their proper role and strive not to subvert the democratic process, leaders of the political branches should not pass difficult questions to the Judicial Branch because they are unwilling to make tough choices or because they don't have the votes to enact clear language to advance their policy agenda. This far too common occurrence puts the courts in an untenable position. If there is a danger in judges removing policy discussions from the political sphere, then the political branches themselves should avoid encouraging that tendency.

III. JUDICIAL SELECTION

As I discussed earlier, the Constitution wisely protects federal judges from retaliation by providing them life tenure and forbidding Congress from reducing their pay. Short of the extraordinary measure of impeachment, the only true check on judicial over-reaching is the judges themselves. This is why the President and I view it as so important to select judges who embrace a philosophy of judicial restraint.

The President promised during both of his election campaigns to select judges who understand the proper role of the Judiciary in our constitutional democracy. As his Attorney General, I am charged with helping him find such people.

It is worth noting how we do not go about determining who shares the President's vision of a good judge. We do not ask about a candidate's political views. Because judges are expected to set them aside when they don their judicial robes, these views are irrelevant.

Of course, to set aside personal views and rule according to the law is not always easy. All judges will be tempted to abandon judicial philosophy on cases they care about. The good ones resist. Indeed, the good ones will apply a misguided law as it exists and trust democracy to fix that law.

Nor do we ask how a judge would rule in a particular case or on a particular legal issue. There are

good reasons for this. First of all, as Justices Roberts and Alito explained so well during their confirmation hearings, it would be inappropriate for a judicial candidate or nominee to predict how he would rule in a case that is not before him. Good judges keep an open mind in every case. They listen to the arguments of both parties, read the briefs, study the applicable law, and only then make a decision about what the law requires.

Moreover, it would be inappropriate for a judicial candidate or nominee to make a promise to the President or to me or to the Senate about how he would rule on an issue. This would undermine the independence of the Judiciary and would be grossly unfair to the parties if such a case later came before that judge. Imagine being the plaintiff in a case assigned to a judge who already had promised to rule against you.

What we do look for, in addition to sterling legal qualifications and upstanding character, is a general philosophy of restraint.

We try to determine whether a candidate understands the respective roles of our branches of government.

We want to know whether he understands the boundaries of Article III of the Constitution.

We want to determine whether he understands the inherent limits that make an unelected Judiciary inferior to Congress or the President in making policy judgments. That, for example, a judge will never be in the best position to know what is in the national security interests of our country. That a judge cannot hold hearings or conduct studies to understand all the possible implications of a policy decision.

We want to know whether he understands how judicial activism undermines democracy.

And we need to know that he can put aside his personal views when he takes the bench.

A judge who understands the importance of these principles will take the right approach in every case.

I believe that selection of judges in this mold benefits everyone, especially Congress. Fundamentally, judges who respect the rule of law respect the right of legislatures to make the law.

Under our Constitution, the President has the prerogative to nominate judges who agree with this philosophy. Of course, it is the Senate’s responsibility to decide whether to confirm the President's nominees. But I think it is fair to note that when the Framers provided for nominations to proceed with the advice and consent of the Senate, they assumed that body would at least consider the nominees.

Today there are too many vacancies on the federal bench nationwide. Many of these have been designated “judicial emergencies” by the Administrative Office of the U.S. Courts. For the Judiciary to be strong, it must be fully staffed. Allowing vacancies on the bench to go unfilled does great damage to the courts in the short and long term – and it does not reflect well on the Senate.

The President has nominated, and is continuing to nominate, strong candidates to fill these vacancies, and we look forward to working with the Senate to confirm them.

The Framers left us a great and powerful legacy when they created our Judiciary. Respecting the prerogatives of the Executive and the Legislature, yet strong and independent, the courts have a vital role in protecting our democracy and the rule of law. President Bush has sought to nominate judges who appreciate this role. I believe he has chosen men and women who do honor to the institution of the Judiciary and to the Constitution. They are men and women we can all be proud of.

Thank you. May God bless you all, and may He continue to bless the United States of America.

###